No. 17-71

In The Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF DEFENDERS OF WILDLIFE, ANIMAL WELFARE INSTITUTE, HUMANE SOCIETY OF THE UNITED STATES, SIERRA CLUB, AND WILDEARTH GUARDIANS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICI CURIAE*[1]

Defenders of Wildlife, Animal Welfare Institute, Humane Society of the United States, Sierra Club, and Wildearth Guardians (*Amici*) are leading non-profit conservation organizations with longstanding interests in protecting wildlife, particularly endangered and threatened species, from habitat destruction and degradation and other threats. On behalf of their millions of members and supporters nationwide, *Amici* advocate for the effective implementation of the Endangered Species Act (ESA or Act) and seek to ensure that native species and the ecosystems on which they depend are preserved and maintained for present and future generations. *Amici*'s extensive experience with the ESA may assist the Court in understanding how the statute operates in practice to protect imperiled species and their habitats without imposing undue burdens on private landowners.

SUMMARY OF THE ARGUMENT

1. The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). In enacting the ESA, Congress recognized that habitat protection is vital for

[1] No counsel for a party authored this brief in whole or in part, and no person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

recovering most imperiled species and established the purpose of the statute to "provide a means" for conservation of the ecosystems on which threatened and endangered species depend. Thus, in addition to prohibiting actions that directly kill or harm members of listed species, Congress ordered the Secretary of the Interior to identify the areas "essential to the conservation of the species" and to designate them as critical habitat "to the maximum extent prudent and determinable." Congress also required that all federal agencies ensure that their actions or authorizations do not cause the "destruction" or "adverse modification" of critical habitat. Designation of critical habitat—both occupied and unoccupied areas—is an indispensable part of Congress's comprehensive program to recover threatened and endangered species. Critical habitat designation provides important benefits for species and generally does so with minimal adverse impact on private lands. Indeed, recovery of species may well depend on designation of unoccupied critical habitat as there is no other mechanism in the ESA that adequately protects these areas.

2. The ESA does not contain, and this Court should not impose, a current "habitability" requirement on the designation of unoccupied critical habitat. This argument, which Petitioner advances for the first time in this Court, not only lacks textual support but makes little sense ecologically. Critical habitat can include historically crucial but now degraded habitat, as well as other areas that are essential to the conservation (*i.e.*, recovery) of the species. In upholding the U.S.

Fish and Wildlife Service's (Service)[2] designation of critical habitat for the dusky gopher frog, the Fifth Circuit did not expand the reach of the ESA; it ruled in accordance with the Act's plain language and conservation purpose and appropriately deferred to the Service's scientific findings.

3. Petitioner's attempt to invoke the doctrine of constitutional avoidance is unfounded. This case turns on a narrow issue of statutory interpretation and is not a necessary or appropriate vehicle for broad pronouncements on constitutional questions or the balance of state and federal powers. Nonetheless, the designation of critical habitat for the dusky gopher frog was a valid exercise of federal power. Accordingly, this Court should affirm the Fifth Circuit's decision.

ARGUMENT

The Endangered Species Act has been remarkably successful in preventing the extinction of species. Only one percent of the more than 1,800 species listed in the United States as endangered or threatened have been declared extinct after receiving the protections of the Act and many species are on the path to recovery. U.S.

[2] The Department of the Interior's U.S. Fish and Wildlife Service administers the Act for terrestrial and freshwater species while the Department of Commerce's National Marine Fisheries Service administers the Act for marine species. The critical habitat provisions apply to both agencies and we therefore use Service or Services throughout this brief to refer to their collective obligations under the Act.

Fish & Wildlife Serv., Delisted Species, https://ecos.fws.gov/ecp0/reports/delisting-report (last visited July 2, 2018); Daniel M. Evans et al., *Species Recovery in the United States: Increasing the Effectiveness of the Endangered Species Act*, Issues in Ecology, Winter 2016, at 1. But despite significant efforts to prevent extinction, the loss of biodiversity, driven largely by habitat degradation and destruction, remains a rapidly growing crisis. *See, e.g.*, Stuart L. Pimm et al., *The Biodiversity of Species and Their Rates of Extinction, Distribution, and Protection*, 344 Science 987 (2014); David Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 Am. Inst. Bio. Sciences 607 (1998); National Research Council, *Science and the Endangered Species Act* 72 (1995), https://www.nap.edu/read/4978/chapter/6#72 ("[T]here is no disagreement in the ecological literature about one fundamental relationship: sufficient loss of habitat will lead to species extinction."). Scientists estimate that by 2050, 10 percent of all terrestrial species will be "committed to extinction." Elizabeth Kolbert, *The Sixth Extinction: An Unnatural History* 167–68 (2014); *see also* Daniel A. Farber, *Separated at Birth? Addressing the Twin Crises of Biodiversity and Climate Change*, 42 Ecology L.Q. 841, 846 (2015) (noting that climate change will exacerbate biodiversity loss).

Amici submit this brief to underscore the vital role that designation of critical habitat plays in the ESA's comprehensive scheme to protect threatened and endangered species and the ecosystems on which they depend. Accordingly, this brief will focus on the benefits

of critical habitat for species and the narrow question of statutory interpretation that Petitioner presents to this Court: whether the ESA requires critical habitat to be habitable by the species at the time of designation. *Amici* urge the Court not to graft onto the ESA a requirement of current habitability for unoccupied areas. This extra-statutory requirement is fundamentally inconsistent with Congress's decision to allow for the designation of unoccupied areas that are biologically "essential" for species conservation. Such a rule would undermine the conservation value of critical habitat and make species recovery—the ESA's ultimate goal—less likely.

Beyond this issue of statutory construction, which Petitioner raises for the first time in this Court, Petitioner's challenge amounts to no more than a garden-variety disagreement with the views of an expert agency entrusted by Congress to perform a highly technical task. The Service's designation of Unit 1 as dusky gopher frog critical habitat was based on a thorough review of intact and restorable habitat areas. The Service designated this unoccupied critical habitat only after independent peer reviewers determined that existing occupied habitat was not sufficient for recovery and that the area contained unique and irreplaceable features essential to the conservation of the species. On such ecological questions, including what specific habitat is essential for the frog's recovery, this Court has repeatedly instructed that courts owe the Service a high level of deference. No persuasive, let alone

compelling basis exists for upsetting the Service's expert judgment here.

This brief will not address whether the Service's decision not to exclude areas from critical habitat is separately reviewable from the designation itself. Our focus here is on the proper statutory interpretation of "unoccupied critical habitat" and the deference due the Service's scientifically-grounded determinations.

I. Critical habitat is an integral part of the ESA's comprehensive program to conserve imperiled species

A. Congress designed the ESA to address the threats of habitat loss and degradation

When Congress passed the ESA in 1973 it was acutely aware that stemming the loss of biodiversity required more than protecting individual animals and plants: it also required protecting habitat from destruction or adverse modification. Of the many threats to America's wildlife heritage, Congress recognized that the "most significant has proven also to be the most difficult to control: the destruction of critical habitat." H.R. Rep. No. 93-412, at 4 (1973); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. at 179 ("Congress started from the finding that '[t]he two major causes of extinction are hunting and destruction of natural habitat.' Of these twin threats, Congress was informed that the greatest was destruction of natural habitats.")

(quoting S. Rep. No. 93-307, at 2 (1973) *as reprinted in* 1973 U.S.C.C.A.N. 2989, 2990).[3]

In the 1978 amendments to the ESA, Congress reemphasized that "[t]he loss of habitat for many species is universally cited as the major cause for the extinction of species worldwide." H.R. Rep. No. 95-1625, at 5 (1978). Indeed, in the lead-up to those amendments, Congress specifically stated that "if the protection of endangered and threatened species depends in large measure on the preservation of the species' habitat, then the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat." H.R. Rep. No. 94-887, at 3 (1976).

To that end, the ESA's purpose is not only to address actions directed at species themselves—such as hunting and trade—but also to "provide a means whereby the *ecosystems* upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b) (emphasis added). Conservation is statutorily defined as "the use of all methods and

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[3] The legislative history demonstrates that Congress understood this relationship between species protection and habitat loss. *See, e.g.*, 119 Cong. Rec. 30,528 (1973) (statement of Rep. Lehman) ("The new law recognizes that the greatest threat to endangered animals has been man's destruction of their habitat."); *see also* 119 Cong. Rec. 30,162 (1973) (statement of Rep. Sullivan) ("For the most part, the principal threat to animals stems from the destruction of their habitat."). After the 1978 amendments, one senator even said, "the designation of critical habitat is more important than the designation of an endangered species itself." 124 Cong. Rec. S21,575 (daily ed. July 19, 1978) (statement of Sen. Garn).

procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." *Id.* § 1532(3). This conservation mandate covers the Act from nose to tail. As this Court has recognized, the "plain intent of Congress" in enacting the ESA "was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Tenn. Valley Auth.*, 437 U.S. at 184.

The ESA establishes a framework for the conservation of imperiled species, with specific management actions left to the scientific judgment of the appropriate Service. First, the Service determines whether a species warrants listing as "threatened" or "endangered." 16 U.S.C. § 1533(a)(1). In making this determination, the first factor the Service considers is "the present or threatened destruction, modification, or curtailment of its habitat or range." *Id.* § 1533(a)(1)(A). Consistent with Congress's emphasis on habitat preservation, the Service must also at the time of listing and "to the maximum extent prudent and determinable" designate "any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A), (a)(3)(A)(i).

The ESA recognizes that critical habitat can be occupied or unoccupied by the species at the time of listing and provides separate definitions for each. Occupied critical habitat is defined as "the specific areas within the geographical area occupied by the species,

at the time it is listed . . . *on which are found those physical or biological features (I) essential to the conservation of the species* and (II) which may require special management consideration or protection." *Id.* § 1532(5)(A)(i) (emphasis added). By contrast, the definition of unoccupied critical habitat includes the "specific areas outside the geographical area occupied by the species at the time it is listed . . . *upon a determination by the Secretary that such areas are essential for the conservation of the species.*" *Id.* § 1532(5)(A)(ii) (emphasis added). Notably, Congress's definition of unoccupied critical habitat specifically *omits* the requirement that such habitat possess the "physical or biological features" essential to species conservation and, instead, requires only that the Service make a "determination . . . that such areas are essential for the conservation [i.e., recovery] of the species." *Compare* 16 U.S.C. § 1532(5)(A)(i) *with* 16 U.S.C. § 1532(5)(A)(ii). For both occupied and unoccupied critical habitat, the Service must make a species-specific determination "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat." *Id.* § 1533(b)(2).

Once a species is listed, a series of substantive and procedural requirements attach. While section 9 prohibits "take" of endangered species without prior authorization, *id.* § 1538(a)(1)(B),[4] section 7(a)(1) imposes

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[4] Section 9's prohibitions apply only to endangered species but may be extended in whole or in part to threatened species

on federal agencies a substantive obligation to promote the conservation of listed species. *Id.* § 1536(a)(1). Moreover, section 7(a)(2) obligates federal agencies to consult with the Service whenever they act, authorize, or fund a project that may affect a listed species or its designated critical habitat. *Id.* § 1536(a)(2). Through consultation, federal agencies must ensure that their actions will not "jeopardize the continued existence" of a listed species or "result in the destruction or adverse modification" of critical habitat. *Id.* § 1536(a)(2). This consultation process is designed to lessen the impact of federal or federally-permitted activities on species and their critical habitats. In practice, consultation has allowed most development projects to proceed with no more than minor modifications.

Section 7 is particularly important for unoccupied critical habitat because while such habitat may in fact be indispensable to the species' conservation, there is no other statutory mechanism for protecting these areas. The Act's take prohibition protects species from, among other things, "harm," *id.* § 1538, but the regulatory definition of "harm" only applies to habitat modification that actually kills or injures wildlife which is unlikely to happen if the listed species is not present. 50 C.F.R. § 17.3; *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995) (requiring a reasonable likelihood of harm to individual animals for habitat modification to constitute take under the ESA).

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pursuant to regulation. 16 U.S.C. § 1533(d). The U.S. Fish & Wildlife Service has enacted a blanket rule extending section 9 prohibitions to threatened species. 50 C.F.R. § 17.31(a).

By contrast, the proscription on federal agency actions that may destroy or adversely modify critical habitat protects designated areas regardless of whether an action will directly harm individual animals. Thus, critical habitat designation provides the only statutory protection for areas that are unoccupied but necessary for the expansion and recovery of the species.[5]

Congress's determination that unoccupied habitat may nonetheless be essential to conservation, even if it is not habitable when designation occurs, makes biological and practical sense. When a species with a previously larger range has been reduced to a small patch of presently suitable habitat by the "destruction [or] modification . . . of its habitat," 16 U.S.C. § 1533(a)(1)(A), recovery may necessarily require the protection of both the dwindling areas where the species still occurs and other areas needed for its conservation, including historically occupied areas capable of being restored and recolonized. For such species, designation of unoccupied critical habitat plays an indispensable role in their recovery.

B. Designating critical habitat promotes species recovery

Critical habitat's operative weight stems from section 7's consultation requirement. 16 U.S.C.

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[5] Even that protection is limited because it only extends to discretionary actions authorized, funded, or carried out by federal agencies. *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007).

§ 1536(a)(2). For projects on federal lands or that require federal funding, approval, or implementation, section 7 provides important substantive and procedural checks on actions affecting habitat that is essential to a species' conservation. But designation also generates valuable information that federal, state, local, and private landowners can use to help conserve species. These benefits may be just as important as the action-forcing provisions described above.

When critical habitat is designated on federal lands, it can help prioritize section 7(a)(1) conservation efforts. Under section 7(a)(1), all federal agencies must "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1). This obligation covers everything from recovery planning to direct restoration of habitat on federal lands. Take, for example, the U.S. Forest Service's efforts to restore degraded unoccupied critical habitat for the New Mexico meadow jumping mouse. Unoccupied critical habitat for this species was designated along riparian tracts degraded by years of overgrazing. 81 Fed. Reg. 14,264, 14,267 (Mar. 16, 2016). Following designation, the Forest Service engaged with conservation partners and local ranchers to install a series of cattle exclusion fences and alternative water sources that allowed these degraded areas to return to their natural condition and once again host the mouse. U.S. Forest Service, *New Mexico Meadow Jumping Mouse Habitat Improvement Projects on the*

Agua Chiquita Grazing Allotment, https://www.fs.usda.gov/project/?project=51273 (last visited July 2, 2018). Without critical habitat designation, it is unlikely that these areas would have received the same priority.

Critical habitat designation also provides broad notice to both federal agencies and the public of the location and importance of the particular areas that are essential to species recovery. Listing the species alone may not adequately convey this information. Federal agencies and private landowners alike may be otherwise unaware of the importance of an area to a species' recovery because even the most diligent survey of the area may not reveal the listed species or the physical or biological characteristics associated with its survival. Jack McDonald, *Critical Habitat Designation Under the Endangered Species Act: A Road to Recovery?*, 28 Envtl. L. 671, 688-91 (1998) (discussing the notice benefits of designation). This is especially true for migratory species and those that depend on ephemeral habitats.

A prime example of this occurs in the glacial outwash prairies of western Washington, where four listed subspecies of Mazama pocket gopher are found. 79 Fed. Reg. 19,760, 19,772 (Apr. 9, 2014). These gophers spend most of their lives underground, which makes observation extremely difficult. *Id.* That difficulty is compounded by the species' tendency to shift its occupied range from generation to generation. 79 Fed. Reg. 19,712, 19,715 (Apr. 9, 2014) (designating critical habitat) ("movements result in apparent changes of the occupancy status of a specific site over time, as juveniles

disperse and colonize new sites, or conversely, as territorial individuals die and specific sites become unoccupied"). If unoccupied areas were not protected by critical habitat designation, the species' protected habitat would be limited to the occupied range at the time of listing, and subsequent generations would not have sufficient protected habitat in which to disperse. Designation of critical habitat allows the Service to identify areas that are presently unoccupied or otherwise appear to lack conservation value and highlights their importance to the species.

Additionally, the information developed during the designation process can help focus the efforts of conservationists, states, and private landowners when developing habitat conservation plans. Even where no federal action is involved, these actors may elect to tailor their activities to avoid negatively affecting a sensitive area. *See, e.g.*, Dashiell Farewell, *Revitalizing Critical Habitat: The Ninth Circuit's Pro-Efficiency Approach*, 46 Envtl. L. 653, 663 (2016) ("With more parties on notice the more likely it is that habitat will receive the consideration and protection it deserves.").

Designation can also help maximize the conservation value of land acquisition by allowing parties to target those areas that would most benefit a species. For example, after conservation groups expressed concern about development near one of the dusky gopher frog's last known breeding ponds, the real estate developers agreed to a land purchase that protected 170 acres of critical habitat for the species. *See* Press Release, Ctr. for Biological Diversity, *Land Purchase*

Protects Essential Mississippi Habitat for Endangered Dusky Gopher Frog (May 14, 2015), https://www.biologicaldiversity.org/news/press_releases/2015/dusky-gopher-frog-05-14-2015.html.

Perhaps most importantly, designating critical habitat ensures that adequate focus is placed on species recovery and not just survival. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (requiring the Service to provide for species recovery, not just survival, in designating critical habitat). While other provisions of the Act protect species from direct harm, *see* 16 U.S.C. §§ 1536, 1538, or authorize the discretionary acquisition of lands, *see id.* § 1534, only critical habitat mandates that the Service determine precisely which areas are essential to recovery. *Id.* §§ 1532(5), 1533(a)(3)(B). In fact, of all the provisions in the ESA, critical habitat designation may contribute the most to recovery because it is not limited just to those areas where a species lives at any given moment. This is particularly true for species that have been driven to the point of extinction by habitat loss.

Designation of unoccupied critical habitat is especially important for areas that were historically occupied or are scientifically determined to be essential for expansion of a species' range in the future. Michael J. Bean & Melanie J. Rowland, *The Evolution of National Wildlife Law* 261–62 (3d ed. 1997) ("Unoccupied critical habitat is habitat, the protection of which is needed to improve the species' status quo; that is, it is primarily needed for the recovery of the species."). If the goal

is to recover species to a point where the Act's protections are no longer needed, then logically "it will be necessary to protect some of [a species'] former habitat as well as that which it currently occupies." Kalyani Robbins, *Recovery of an Endangered Provision: Untangling and Reviving Critical Habitat Under the Endangered Species Act*, 58 Buff. L. Rev. 1095, 1105 (2010).

Critical habitat's contribution to recovery will, of course, vary on a species-by-species basis, but research shows a correlation between critical habitat designation and positive trends in recovery status. *See* Martin F.J. Taylor, *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 BioScience 360, 363 (2005). Other studies have shown that designation of critical habitat is "correlated with increased effort to protect species." Amy N. Hagen & Karen E. Hodges, *Resolving Critical Habitat Designation Failures: Reconciling Law, Policy, and Biology*, 20 Conservation Biology 399, 400 (2006). Indeed, species with critical habitat are also more likely to have recovery plans that are up to date and being implemented than species without critical habitat. *Id.* ("Critical habitat designation therefore helps populations improve, increases knowledge about trends, and contributes to recovery goals being met."). Critical habitat is thus an important tool for recovering species, the ultimate goal of the ESA. 16 U.S.C. §§ 1531(b) (purposes), 1532(3) (definitions of "conserve," "conserving," and "conservation").

C. Petitioner vastly overstates the economic impacts of critical habitat designation

Contrary to the alarmist rhetoric adopted by Petitioner and supporting *amici*, critical habitat serves a vital function in the ESA's conservation scheme without imposing an undue burden on economic activity. Designating critical habitat does not convert an area into a park or preserve, nor does it require that humans cease all activity on the land. The consultation requirement that attaches to critical habitat is directed solely at federal agency actions. 16 U.S.C. § 1536(a)(2). Thus, so long as no federal permit is required, and no federal funding needed, designating critical habitat on private land has no effect on the owner's use of the property.

Even when a federal permit is required, empirical evidence demonstrates that section 7 consultation almost never stops a proposed development in its tracks. After examining every consultation recorded by the U.S. Fish and Wildlife Service between January 2008 and April 2015, Malcom and Li determined that "no project has been stopped or extensively altered as a result of FWS concluding either jeopardy or destruction/adverse modification of critical habitat." Jacob Malcom & Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act*, 112 PNAS 15844, 15845 (2015) (reviewing all 88,920 USFWS consultations from January 2008 through April 2015). Most consultations during this period were informal, but of the 6,829 formal consultations, only two resulted in a jeopardy

determination. *Id.* In only one of those two cases did the Service find that the proposed action would destroy or adversely modify critical habitat. *Id.* Despite that finding, the proposed action was approved with the adoption of reasonable and prudent alternatives that minimized impacts to habitat. *Id.*[6] As this research shows, section 7 does not, in theory or practice, hamstring all private development. Rather it advances the ESA's recovery goals by striking a science-driven balance between conservation and economic activity.

On the record before the Court, Petitioner has not sought, let alone been denied, federal permits to develop Unit 1, and it is undisputed that the critical habitat designation does not impede current silviculture activities on the site. Pet. Br. at 42 (noting that they could "forego [Clean Water Act] permitting or other federal involvement and continue to operate Unit 1 as a commercial forest"). Even if Petitioner must ultimately seek federal permits for the proposed development,[7] it is unlikely that a section 7 consultation would scuttle their plans. It is entirely possible that

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[6] While several earlier studies found higher rates of jeopardy and adverse modification findings, such findings were still extremely rare. *See, e.g.*, Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 Fla. L. Rev. 141 (2012) (from 2005 to 2009, 7.2% of consultations related to U.S. Fish & Wildlife Service administered fish species resulted in jeopardy); H.R. Rep. No. 97-567, at 13 (1982) (House Report on 1982 ESA amendments noting that only 1.8% of consultations resulted in jeopardy and that of those only two projects were ultimately halted).

[7] Here, ESA regulations are only implicated if there is a federal nexus, like a section 404 permit under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (1972).

residential development of the area could proceed along with a habitat conservation plan to preserve the rare ponds on the property and restore upland features that are optimal for the frog's lifecycle. Alternatively, other private actors could purchase the property for conservation purposes.[8]

We cannot stress enough: designating this area as critical habitat is only the first step in a process to determine how it will contribute to the frog's recovery. In contrast with the lack of evidence supporting Petitioner's speculative injuries, record evidence shows that Unit 1 is essential to the conservation of the dusky gopher frog because it is the last remaining area of the species' historic range that could still support the species in the future. 77 Fed. Reg. 35,118, 35,124 (June 12, 2012) ("the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog"). Moreover, the breeding ponds cannot be replaced or restored once destroyed. *Id.* at 35,123 (noting

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[8] Judge Owen's dissenting opinion makes much of Petitioner's alleged opposition to restoration efforts on the property and focuses on the remote likelihood that restoration would occur. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 487 (5th Cir. 2016) (Judge Owen dissenting). But the current willingness of any existing landowner to conserve or improve a property does not foreclose the Service from determining that a particular area is essential to the species' conservation—a determination that, under the statute, turns on biological facts rather than landowner preference. The point of designating critical habitat is to identify and provide notice of the areas scientists believe are essential to a species' recovery before options for conservation are foreclosed.

that years of effort to restore or recreate habitat of similar quality elsewhere have failed). Thus, Unit 1 provides the best chance of increasing the representation, resiliency, and redundancy that are essential to the recovery of the dusky gopher frog.[9] If the Service cannot designate the last places on earth that the frog could potentially breed as critical habitat, there is little hope for the species.

II. Imposing a temporal habitability requirement on unoccupied critical habitat is neither mandated by the ESA's plain language nor reconcilable with the Act's conservation purpose

A. The ESA does not require that critical habitat be habitable at the time of designation

Petitioner and their *amici* have seized on an extraordinarily broad dissent from the Fifth Circuit's denial of rehearing en banc to assert a new argument that they themselves failed to present to either the district court or the appellate panel below. Pet. Br. at 22–32; Markle Br. in Support of Pet. at 26–28. This argument, that unoccupied critical habitat must be habitable at the time of designation, conflicts with the ESA's plain language and would significantly diminish, if not eviscerate, the value of unoccupied critical habitat for the conservation of habitat-limited species.

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[9] Evans, *supra*, at 6, 22 (describing the "3R's" of species recovery).

The ESA defines unoccupied critical habitat as the "specific areas" that the Service determines to be "essential for the conservation" of the species. 16 U.S.C. § 1532(5)(A)(ii). This definition focuses on whether an area is essential for conservation, *i.e.*, recovery, not whether it could, as is, support the species. A requirement that critical habitat must be immediately occupiable at the time of designation has no basis in the statutory language and would foreclose designation of restorable areas, areas that shift into and out of habitability, and areas that the Service has determined to be essential for species conservation because they provide the source of ecological benefits for occupied portions of the species' range.

Petitioner's effort to read a present habitability requirement into the statute is problematic in many respects. Most significantly, Congress did not create such a requirement. In fact, it did the opposite. Again, the statute defines occupied critical habitat as areas on which "*are found* those physical or biological features" that are "essential to the conservation of the species." *Id.* § 1532(5)(a)(i) (emphasis added). In the very next subsection, Congress omitted any such present tense requirement for unoccupied critical habitat, and instead required only a "determination by the Secretary that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). It is axiomatic that Congress acts intentionally when it "includes particular language in one section of a statute but omits it in another section of the same Act." *Dean v. United States*, 556 U.S. 568, 573 (2009). Applying that principle here

leads to the inescapable conclusion that Congress did not require that unoccupied critical habitat must be habitable by the species at the time of designation.

To avoid this straightforward reading of the statute, Petitioner relies heavily on a dictionary definition of "habitat." Pet. Br. at 23. But that definition gets Petitioner nowhere. Indeed, it circumvents another cardinal rule of statutory construction: dictionary definitions only come into play when Congress itself has not defined the term at issue. *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."). Here, Congress defined unoccupied critical habitat in a manner that is irreconcilable with Petitioner's interpretation. In the "Definition" section of the ESA, Congress established what unoccupied critical habitat means. That definition does not support any requirement that the species must be able to exist in the "area" in question at the moment of designation.

Even if Congress had not already defined the relevant term, Petitioner's argument would still fail. Petitioner defines habitat as "the place where a plant or animal species naturally lives and grows" or "the kind of site or region with respect to physical features . . . naturally or normally preferred by a biological species." Pet. Br. at 23 (citing Habitat, *Webster's Third New Intl. Dictionary* (1976)). To Petitioner, if a species cannot currently live on a site, then it does not "naturally" live there, and that area cannot qualify as habitat. But such a reading fails to properly examine what

it means for a thing to be "natural." "Natural" has many definitions, among them "growing without human care," "not cultivated," and "closely resembling an original: true to nature." Natural, *Webster's Third New Intl. Dictionary* (1976). This implies a state prior to significant human disturbance. When understood properly, what "*naturally* lives and grows" on Unit 1 are not the loblolly pines that Petitioner cultivates but the longleaf pine forests that could provide "food, shelter and protection" for the frog, 77 Fed. Reg. at 35,131. The frog, after all, naturally lived there until at least 1965. *Id.* at 35,133.

This is not to say that critical habitat requires restoring all designated areas to pre-settlement conditions. It is only to say that restricting critical habitat to unaltered, move-in ready parcels is at odds with not only Congress' chosen definition but the very purpose of the statute itself. There is simply no reasonable basis for construing the meaning of "habitat" so narrowly as to exclude, for example, historically occupied habitat that has become degraded but is nonetheless vital for species recovery efforts.

B. A temporal habitability requirement would undermine the conservation value of critical habitat

Petitioner's proposed extra-textual requirement ignores the reality of habitat modification, the very force that has driven many species to the point of

extinction and which Congress sought to address by passing the ESA. 16 U.S.C. § 1531(b). For many species, recovery requires protecting more than limited parcels of pristine habitat. It requires protecting remnants of degraded lands that are necessary to the species' conservation (*i.e.*, recovery). That is why Congress left it to the Service to ascertain which "specific areas" of unoccupied habitat are "essential for the conservation" of species that have been listed as endangered or threatened. Determining which lands are essential to fulfilling the ESA's recovery goals is a question for science, not *Webster's* dictionary.

By Petitioner's standard, currently unoccupied habitats that could be rendered suitable for occupation with even minor restoration efforts could never qualify for designation. This would be the case on federal lands, leaving agencies without crucial information to inform their 7(a)(1) conservation duty to promote the recovery of species like the New Mexico meadow jumping mouse, *see supra* Section I.B., as well as on private lands where landowners may be willing to help restore critical habitat through voluntary conservation efforts. *See Rangewide Conservation Plan for Longleaf Pine*, America's Longleaf Restoration Initiative (2009), http://americaslongleaf.org/media/86/conservation_plan.pdf (describing a plan to restore 8 million acres of longleaf pine forest on private land by 2025).

A current habitability requirement could also preclude the Service from designating dynamic habitats that cycle in and out of habitability. Some species require transitory or ephemeral habitats that may go

long periods without habitation. Many migratory shorebirds, for example, rely on intertidal habitats that are constantly changing and may be unsuitable from one year to the next. *See, e.g.*, Revised Designation of Critical Habitat for the Wintering Population of the Piping Plover (*Charadrius melodus*) in North Carolina, 73 Fed. Reg. 62,816, 62,818 (Oct. 21, 2008) (noting that "designating specific locations of critical habitat for the wintering piping plovers is difficult because the coastal areas they use are constantly changing due to storm surges, flood events, and other natural geo-physical alterations of beaches and shoreline"). Similarly, vernal pool species depend on ephemeral ponds that may go long periods without exhibiting the characteristics necessary for the species to thrive. Final Designation of Critical Habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon, 70 Fed. Reg. 46,924, 46,925 (Aug. 11, 2005) (noting that "the duration of ponding of vernal pools also varies, and in certain years some pools may not fill at all").

Just as harmful, Petitioner's reading would foreclose the possibility of designating areas that are not themselves habitable but which provide the physical or biological features that are essential to the survival of the species in occupied areas. Take, for example, the upstream reaches of the Big Tujunga Creek that provide stream and sediment flows necessary for the survival of the Santa Ana sucker in downstream occupied areas, *see* 75 Fed. Reg. 77,961, 77,973 (Dec. 14, 2010), or the sandy desert north of Ramon Road in Riverside

County, California that provides the source of windblown sand essential to the conservation of the Coachella Valley fringe-toed lizard in its range to the south, *see* 45 Fed. Reg. 63,812, 63,818 (Sep. 25, 1980). Under Petitioner's reading of the statute neither area could be designated because they were not suitable for occupation by the species at the time of designation.[10]

A current habitability requirement would put species like these at risk of extinction. In her dissent from denial of rehearing en banc, Judge Jones dismissed this concern as a mere "consequence of a more precise textual interpretation" but the Fifth Circuit panel ruling is far more faithful to the precise language used by Congress to define unoccupied critical habitat. *See supra* Section II.A. Likewise, the Ninth Circuit expressly rejected the argument that unoccupied but essential upstream areas should be excluded from the Santa Ana sucker designation because these areas were not occupied (or occupiable) habitat. As the court held,

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[10] Protection of unoccupied areas like these is not, as Judge Jones suggests, assured by section 7(a)(2)'s consultation requirement. While an action "does not have to occur on designated critical habitat to trigger section 7 consultation," *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 645 (5th Cir. 2017) (Judge Jones dissenting), where no critical habitat is designated, the presence of the species is typically what triggers consultation. *See* U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., Endangered Species Consultation Handbook at 3-11, https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf ("A biological assessment is required if listed species or critical habitat may be present in the action area.") (last visited July 2, 2018).

"[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as habitable." *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015). Again, essentiality, not present habitability, is what is required by the plain terms of the Act.

Neither Petitioner nor the dissenting judges articulate when, if ever, unoccupied critical habitat would be designated under their approach. Their counterintuitive and extra-textual approach would foreclose designation in numerous instances where areas are essential to species' conservation. Such a result is not consistent with the plain language and purpose of the ESA.

C. The Fifth Circuit's ruling did not "vastly expand the ESA"

In upholding the Service's determination that Unit 1 is essential to the conservation of the dusky gopher frog, the Fifth Circuit did not "vastly expand the ESA," Pet. Br. at 35, nor did the court render unoccupied habitat "easier to designate" than occupied habitat. *Cf. Markle Interests, L.L.C.*, 848 F.3d at 646 (Judge Jones dissenting). As discussed above, the text of the statute provides clear limits on the Service's authority to designate critical habitat. Before designating unoccupied areas, the Service must determine, on the basis of the best scientific data available, that a specific area is in fact "*essential* for the conservation of the species,"

16 U.S.C. § 1532(5)(A) (emphasis added). Petitioner and their *amici* unduly minimize this statutory requirement.

Judge Owen's panel dissent turns to the dictionary definition of "essential" to argue that an area that does not *presently* support a species' population (and which could require some degree of restoration to do so) cannot possibly be essential. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 483 (5th Cir. 2016) (Judge Owen dissenting). But this argument is unavailing. Black's Law Dictionary defines "essential" as "1. Of, relating to, or involving the essence or intrinsic nature of something. 2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Essential, *Black's Law Dictionary* (10th ed. 2014). While Judge Owen emphasizes that Unit 1 "is not 'actual[ly]' playing any part in the conservation of the endangered frog species," 827 F.3d at 483 (quoting *Black's*), this focus on the *present* value of habitat misses an important textual nuance.

The ESA's definition of "conservation" requires consideration *both* of a species' current survival needs and what is necessary for its recovery. 16 U.S.C. § 1532(3); *see also Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441–42 (5th Cir. 2001) ("'Conservation' is a much broader concept than mere survival."). The purpose of the ESA, after all, is to recover species to the point that the Act's protections are no longer necessary. 16 U.S.C. § 1532(3). An area that is presently unoccupied by a species may or may not provide a current benefit to the species. But it may

nonetheless be "of the utmost importance" and "essential to the conservation" of the species now and in the future. *Id.* § 1532(5).

As this case illustrates, the Service must find, after taking into account economic and other factors, that the best available scientific data supports the proposition that a presently unoccupied area is "essential for the conservation of a species." 16 U.S.C. § 1533(b)(2). Here, the Service designated Unit 1 as unoccupied critical habitat only after making a scientific determination that existing occupied critical habitat was insufficient to conserve the frog. The Service's original proposal only included occupied sites within Mississippi. *See* 75 Fed. Reg. 31,387, 31,395 (proposed June 3, 2010). But scientific peer reviewers of the proposed rule "were united in their assessment that this proposal was inadequate for the conservation of the dusky gopher frog." 77 Fed. Reg. at 35,123–24. Before designating Unit 1, the Service surveyed recorded sightings of the frog throughout its historic range and followed up on those leads with detailed aerial and on-the-ground surveys of potential remnant habitat. *Id.* at 35,133 (noting that the five ponds on Unit 1 were of "remarkable quality"). It also ruled out many other areas in both Alabama and Louisiana that lacked the breeding ponds that are so important to the frog's lifecycle. *Id.* Finally, the Service weighed the economic burden of designating Unit 1 against the conservation benefit from such action and determined that it was not appropriate to exclude these tracts. *Id.* at 35,140–41.

There is simply no substance to the notion that the Fifth Circuit's decision expanded the ESA by making it easier to designate unoccupied areas than occupied ones.[11] Congress adopted the definition of critical habitat and elected, for reasons that make perfect sense, not to require that unoccupied areas contain the "physical or biological features essential to the conservation of the species." Congress knew how to articulate a standard requiring the identification of specific features; it did so for occupied areas. But it chose different criteria for designating unoccupied critical habitat. A court cannot contradict the statute's plain language simply because it believes that unoccupied areas should be more difficult to designate than occupied areas for policy reasons that are nowhere to be found in the statute itself.

As the Fifth Circuit explained: "The Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the

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[11] Implicit in the arguments of Petitioner and their supporting *amici* is the notion that the Service could be over-designating unoccupied areas. This fear is unfounded. As an empirical matter, the Service rarely designates unoccupied critical habitat. Abbey E. Camaclang et al., *Current Practices in the Identification of Critical Habitat for Threatened Species*, 29 Conservation Biology 482, 482–92 (2014) ("In addition, unoccupied habitat was included as part of critical habitat for less than one third of the species we considered [from 2003 to 2012]."); *see also* Stephanie Brauer, Note, *Arizona Cattle Growers' Pyrrhic Victory for Critical Habitat*, 38 Ecology L.Q. 369, 379 (2011) ("Despite its importance, unoccupied habitat constitutes 'a relatively small amount of habitat designated as critical habitat.'").

designation could not stand." *Markle Interests, L.L.C.*, 827 F.3d at 472. The Service's science-based determination that Unit 1 is essential for the conservation of the dusky gopher frog warrants judicial deference. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) ("when examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential").

III. The Fifth Circuit's ruling neither impinges on the rights of states nor raises constitutional questions

Although this Court granted certiorari on only narrow issues of statutory interpretation, Petitioner and their supporting *amici* seek to import into the case issues of states' rights and constitutional concerns through the doctrine of constitutional avoidance. These issues, however, are far beyond the scope of what this Court needs to, or should, address for the purposes of this case. *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993) (when a case can be decided on purely statutory grounds the Court should follow a "prudential rule of avoiding constitutional questions"). Nonetheless, a brief rebuttal of these arguments is in order.

First, the assertion that protection of the nation's wildlife is merely a matter of state concern is belied by more than a century of direct federal involvement in wildlife conservation. Going back at least as far as the Lacey Act of 1900, 16 U.S.C. §§ 3371–3378 and 18 U.S.C. § 42, and the Migratory Bird Treaty Act of 1918

(MBTA), 16 U.S.C. §§ 703–711, this Court has consistently upheld federal regulation in this area. *See, e.g.*, *Missouri v. Holland*, 252 U.S. 416 (1920) (upholding the MBTA); *Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979) ("[the] assumption that the national commerce power does not reach migratory wildlife is clearly flawed.").

Circuit courts have unanimously followed the holdings in those cases to reject arguments that the ESA infringes on traditional state powers. As the Fourth Circuit held: "[E]ndangered wildlife regulation has not been an exclusive or primary state function" but is instead "an appropriate and well-recognized area of federal regulation." *Gibbs v. Babbitt*, 214 F.3d 483, 500 (4th Cir. 2000). *See also Rancho Viejo, L.L.C. v. Norton*, 323 F.3d 1062, 1078–79 (D.C. Cir. 2003) ("Far from encroaching upon territory that has traditionally been the domain of state and local government, the ESA represents a national response to a specific problem of 'truly national' concern.") (quoting *Gibbs*, 214 F.3d at 505). For that reason, the D.C. and Fourth Circuits have both concluded that the ESA is consistent with principles of federalism: "[T]o sustain challenges of this nature 'would require courts to move abruptly from preserving traditional state roles to dismantling historic federal ones.'" *Rancho Viejo*, 323 F.3d at 1079–80 (quoting *Gibbs*, 214 F.3d at 504).

Second, there is no serious constitutional question here. "The substantial relationship between the ESA and interstate commerce is patent." *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 1006 (10th Cir. 2017), *cert.*

denied, 138 S. Ct. 649 (2018). When it enacted the ESA, Congress determined that endangered and threatened species are not only of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people," 16 U.S.C. § 1531(a)(3), but also contain a genetic heritage of "incalculable" value. *Tenn. Valley Auth.*, 437 U.S. at 178. Congress was concerned as well with "the *unknown* uses that endangered species might have and the *unforeseeable* place such creatures may have in the chain of life on this planet." *Id.* at 178–79. *See also Palila v. Haw. Dep't of Land & Natural Res.*, 471 F. Supp. 985, 995 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) ("[A] national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons . . . who come to a state to observe and study these species, that would otherwise be lost by state inaction.").

As all six circuits to address the issue have held, Congress properly determined that endangered and threatened species protection is economic and that protection of all imperiled species—no matter their current trade value or state of residence—is essential to preserving America's wildlife resources.[12] Even if an

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[12] *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990 (10th Cir. 2017) (upholding ESA protection for the Utah prairie dog), *cert. denied*, 138 S. Ct. 649 (2018); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011) (delta smelt), *cert. denied sub nom. Orchards v. Salazar*, 565 U.S. 1009 (2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007) (Alabama

individual application of the ESA does not appear to affect commerce directly, Congress has the power to "'regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.'" *Gonzales v. Raich*, 545 U.S. 1, 25–27 (2005) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)). As this Court has held, "[w]here the class of activities is regulated and that class is within the reach of federal power the courts have no power 'to excise, as trivial, individual instances of the class.'" *Raich*, 545 U.S. at 23 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)).

Congress intended the ESA to protect the dusky gopher frog and its critical habitat, which spans multiple states, as an essential part of the ESA's comprehensive scheme to preserve the nation's biodiversity heritage. Even if it could be argued that the designation of Unit 1 does not directly affect interstate commerce, "that the regulation ensnares some purely intrastate activity is of no moment." *Id.* at 22. Courts should not "excise individual components of that larger scheme." *Id.*

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sturgeon), *cert. denied*, 552 U.S. 1097 (2008); *GDF Realty Inv., Ltd. v. Norton*, 362 F.3d 286 (2004) (cave species), *cert. denied*, 545 U.S. 1114 (2005); *Rancho Viejo, L.L.C. v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) (arroyo toad), *cert. denied*, 540 U.S. 1218 (2004); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (red wolf), *cert. denied sub nom. Gibbs v. Norton*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (Delhi Sands flower-loving fly), *cert. denied*, 524 U.S. 937 (1998).

Again, this Court need not engage these issues to resolve this case but, if it should be necessary, the result is the same. The designation of unoccupied critical habitat for the dusky gopher frog is well within the reach of federal power.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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